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10 CITY OF ANAHEIM

11 **JAMS ARBITRATION**

13 SANTIAGO GEOLOGIC HAZARD  
14 ABATEMENT DISTRICT, a political  
subdivision of the state of California,

15 Claimant,

16 vs.

17 CITY OF ANAHEIM,

18 Respondent.

JAMS Reference No. 1200059076

Hon. Nancy Wieben Stock (Ret.)

**CITY OF ANAHEIM'S REPLY  
ARBITRATION BRIEF (Limited to 5 Pages)**

Arbitration Hearing Date: January 30, 2023  
Time: 10:00 a.m. (Via Zoom)

1 I. Declaratory Relief is Inappropriate Because a Determination Will Change Nothing.

2 This arbitration may well strike the arbitrator as bizarre in that it involves an alleged  
3 dispute concerning future events that, but for SGHAD’s arbitration demand, would have little or  
4 no likelihood of ever manifesting in litigation or arbitration. That is the reason why it is not a case  
5 of actual controversy requiring declaratory relief under Code of Civil Procedure section 1060.  
6 Providing declaratory relief rewards the filing of litigation when none is necessary. Doing so  
7 would be contrary to the public policy that underlies Code of Civil Procedure section 1060.

8 SGHAD has cited multiple cases for the proposition that a public entity cannot be  
9 compelled to perform an act or obligation, whether statutory or contractual, involving an  
10 expenditure of funds, if it does not affirmatively appear that the public entity has funds available  
11 for the purpose. City does not dispute that proposition. Regardless of any breach of contract, City  
12 knows that it will not be able to compel SGHAD to perform, if SGHAD has no funds to do so.  
13 Accordingly, it is unlikely that a future City Council would pursue an action to compel SGHAD to  
14 perform such obligations once SGHAD’s funds are actually depleted. The fact that a public entity  
15 cannot be compelled to perform a contract, because it lacks the funds to perform, does not mean  
16 that the contract itself does not provide for performance. Instead, it means that a Court cannot  
17 compel performance of what the contract, by its terms, does require. Inability to compel  
18 performance similarly does not mean that the public entity is contractually “excused” from a  
19 breach due to impossibility, impracticability or frustration of purpose; doctrines that are based  
20 upon the occurrence of unforeseeable and/or unforeseen events. Again, it means that  
21 notwithstanding the valid contract and breach, performance cannot be compelled by the courts.

22 The distinction may be technical, but SGHAD insists on continuing this arbitration in  
23 pursuit of this technicality. Claimant’s Opening Brief (“COB”, p. 25:13-17) quotes *Stonehouse*  
24 *Homes LLC v City of Sierra Madre* (2008) 167 Cal.App.4th 531, 540 as stating: “To determine if a  
25 controversy is ripe, a two-pronged test is employed: (1) is the dispute sufficiently concrete that  
26 declaratory relief is appropriate and (2) will withholding judicial consideration result in the parties  
27 suffering hardship.” SGHAD fails to identify the hardship the parties will suffer if declaratory  
28 relief does not issue. SGHAD follows the quote by indicating that members of the public (and

1 City) count on SGHAD to prevent a reactivation of the landslide. They should be advised in a  
2 binding legal decision that SGHAD has no legal obligation to operate the Dewatering Facilities  
3 when the approximately \$380k on hand is expended and that such a day is on the horizon.” It is  
4 already obvious to everyone that SGHAD cannot operate the Dewatering Facilities if it has no  
5 funds. No court or arbitrator needs to tell City, SGHAD or members of the public such a truism.  
6 That fact, of course, was made patently clear to SGHAD members when they voted against an  
7 assessment. The vote was an expression of those voting to accept the risk of ground movement due  
8 to rise in ground water levels, rather than assess themselves to continue to fund SGHAD’s operation  
9 of the Dewatering Facilities. A determination by the arbitrator that SGHAD is not required to  
10 operate the Dewatering Facilities when it has no funds to do so, will change nothing.

11 II. SGHAD’s Implied Condition Argument.

12 While the inappropriateness of declaratory relief should make it unnecessary to address the  
13 merits of SGHAD’s contractual interpretation and arguments for being “excused” from contractual  
14 performance (based on impossibility, impracticability, and/or frustration of purpose), City will do  
15 so in the interest of comprehensiveness.

16 SGHAD claims that City will contend that the duration of SGHAD’s obligation to operate  
17 the Dewatering Facilities is perpetual. SGHAD concedes: “In fairness to the City, there is no  
18 explicit temporal or other limitation on SGHAD’s paragraph 6(a) obligations. Read in isolation,  
19 the City might make a good point.” (COB, p. 18:22-24.) SGHAD goes on to argue that there  
20 must be an implied condition in the Agreement that SGHAD’s obligation to operate after  
21 depletion of the initial \$3.5 million funding was conditioned upon SGHAD’s successful passing of  
22 an assessment. SGHAD cites *Kessler v. General Cable Corp.* (1979) 92 Cal.App.3d 531, 541 for  
23 a purported judicial practice of liberally implying conditions to contracts. *Kessler* hardly stands for  
24 such a proposition. In fact, the *Kessler* court rejected the implied condition urged by the plaintiffs  
25 in that case. *Kessler* set forth a strict test discouraging the finding of implied conditions, stating:

26 It is the law in California that, generally, a strict test is applied in determining  
27 whether or not an agreement—or a representation—carries with it an implied  
28 covenant or promise, *i.e.*, one not expressed by the parties directly. [Citations  
omitted.] It has been said that implied covenants are not favored in the law,  
although some courts have been more liberally inclined than others in interpreting  
a contract as including implied terms. (See, *e.g.*, *Addiego v. Hill* (1965) 238

1 Cal.App.2d 842, 846 [48 Cal.Rptr. 240].) A recent case summarized the conditions  
2 under which an implied covenant would be recognized as follows: [I]t has been  
3 held that covenants or terms in an agreement may be implied only if the following  
4 conditions are met: (1) the implication must arise from the language used or it must  
5 be indispensable to effectuate the intention of the parties; (2) it must appear from  
6 the language used that it was so clearly within the contemplation of the parties that  
7 they deemed it unnecessary to express it; (3) implied covenants can only be justified  
8 on the grounds of legal necessity; (4) a promise can be implied only where it can  
9 be rightfully assumed that it would have been made if attention had been called to  
10 it; and (5) there can be no implied covenant where the subject is completely covered  
11 by the contract. (citing *Hinckley v. Bechtel Corp.* (1974) 41 Cal.App.3d 206, 211.)

12 SGHAD’s argument would create an implied condition excusing performance whenever  
13 one is unable to perform a contract, whether due to bankruptcy, or because the task exceeds one’s  
14 abilities. It may not be possible for a court to always compel performance or payment of damages,  
15 but the contractual breach remains, even if there is no remedy.

16 One of the multiple prerequisites for an implied condition is that it can be rightfully  
17 assumed that it would have been made if attention had been called to it. The evidence is clear that  
18 SGHAD’s members and Board were well aware that the \$3.5 million would not last indefinitely.  
19 Board members asked about this at the initial SGHAD meeting on March 29, 1999 and were told  
20 that City had proposed a larger amount of the settlement go to SGHAD but that had been rejected.  
21 (Decl. of Michael Rubin, ¶ 11; also see Stipulated Facts #14 at lines 17-23.) At its May 10, 1999  
22 meeting when the Agreement was approved, SGHAD’s Board first voted to reject the Agreement  
23 due to inadequate funding. (Stipulated Facts #15, also see Ex. 13, Minutes of May 10, 1999  
24 SGHAD Board Meeting, at SGHAD 4084.)

25 Ironically, SGHAD seeks to exclude evidence of “pre-Delmonico settlement discussions”  
26 that are highly relevant to the implied condition issue. Rubin’s declaration states that City urged  
27 the settlement with plaintiffs include an \$8 million allocation towards funding the proposed  
28 GHAD but this was rejected by Plaintiffs who would only agree to a maximum \$3.5 million of the  
settlement funds towards the proposed GHAD. This is substantiated by the meeting notes of the  
Delmonico Plaintiffs’ Landslide Committee which were important enough for SGHAD to include  
in its agenda packages for the 2022 hearings on the proposed assessment. (see Ex. 3, ANA 533-  
535, and see Ex. 38, SGHAD 4773- 4775.) The relevance is that it was foreseeable to SGHAD’s  
property owners (who voted for SGHAD’s formation), and to SGHAD’s Board (voted to approve

1 the Agreement), that the \$3.5 million was not going to be sufficient to operate the Dewatering  
2 Facilities indefinitely, yet they were accepting SGHAD’s unqualified obligation to do so.

3 The current need for an assessment was foreseen. The Agreement’s Recital G recites the  
4 expectation that SGHAD would not only operate the Dewatering Facilities but “would be  
5 responsible for funding” and “to take such other actions as are necessary to prevent reactivation  
6 and abate movement of the Santiago Landslide”. (Ex. 17, p. 2.) Bona-fide actions to pass an  
7 assessment (only belatedly attempted in 2019 and 2022) were SGHAD’s known responsibilities.

8 SGHAD quotes, out of context, text from the Delmonico settlement agreement, (COB, p.  
9 20:1-5) which actually underscores City’s point. The quote relates to City’s agreed to contractual  
10 obligation to operate the Dewatering System if SGHAD is not formed. Under such circumstances,  
11 City would use the \$3.5 million to operate the Dewatering System, but made it clear that it was not  
12 agreeing to do so after the \$3.5 million was depleted. It was recognized that the \$3.5 million was  
13 not sufficient to operate the Dewatering Facilities indefinitely and that City was not promising to  
14 do so. No such durational limit can be found in the SGHAD Agreement.

15 III. Impossibility, Impracticability, and Frustration of Purpose Are Not Applicable Because the  
16 Circumstances Were Not Unforeseeable or Unforeseen.

17 City concedes that it cannot compel a public entity (like SGHAD) to operate the  
18 Dewatering Facilities if and when SGHAD’s funds are depleted and that mandamus will not issue  
19 to compel SGHAD to perform under those circumstances. That does not mean that SGHAD is  
20 contractually “excused” from performance - it means that performance cannot be compelled.

21 None of the three public entity cases cited in SGHAD’s opening brief are to the contrary.  
22 As set forth in City’s opening brief (pp. 16-18), the doctrines of Impossibility, Impracticability,  
23 and/or Frustration of Purpose cannot serve as grounds to excuse performance by SGHAD because  
24 it was foreseeable that SGHAD would run out of funds absent approval of an assessment. In  
25 *Superior Court v. County of Alameda* (2021) 65 Cal.App.5<sup>th</sup> 838, the County/Sheriff argued that  
26 their MOU with the Court did not require them to fund services beyond the State’s level of  
27 funding. The trial court agreed, but the Court of Appeal disagreed and determined that the MOU  
28 required their performance, whether or not the State’s funding was exceeded. The case was

1 remanded to adjudicate the County/Sheriff’s fact intensive “impracticability” defense. There was  
2 no issue of foreseeability inasmuch as the County/Sheriff never anticipated having to provide  
3 services beyond the State’s funding (nor was the defense even adjudicated at the trial level).

4 *Sutro Heights Land Co. v. Merced Irrigation Dist.* (1931) 211 Cal. 670 dealt with a statute,  
5 not a contract, and addressed whether the statute required the irrigation district “to work its own  
6 destruction by undertaking to provide drainage facilities for the district, the expense of which is  
7 beyond its financial ability to meet or pay for.” (*Id.* at 703.) The court in *Sutro* determined this  
8 was never intended by the statute (contractual foreseeability was not an issue).

9 *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286 also dealt with a statute, not  
10 a contract, and therefore foreseeability was never an issue.

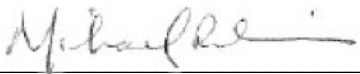
11 IV. Conclusion.

12 SGHAD concedes that it was not even planning to attempt an assessment in 2022, but did  
13 so because of the City’s defenses to the arbitration (COB, 14:27-15:5.) While that proposed  
14 assessment was not successful, the reasons for that may change before SGHAD’s funds are  
15 depleted. SGHAD’s only justification for this arbitration is “to put all interested parties on notice  
16 that SGHAD has been formally relieved of its contractual duties, preclude City from suing  
17 SGHAD for breach of contract, and put to rest the uncertainties arising from the faulty  
18 Agreement.” (COB, p. 28:2-4.) City has never threatened to sue SGHAD for breach of contract  
19 or anything else (and SGHAD has not even alleged to the contrary). This case represents litigation  
20 to avoid litigation that is highly unlikely to ever occur. SGHAD cannot show how declaratory  
21 relief will assist the parties to conform their conduct to the law or to prevent future litigation. It  
22 fails the tests for awarding declaratory relief set forth by the California Supreme Court in *Meyer v.*  
23 *Sprint Spectrum L.P.* (2009) 45 Cal.4th 634 (see City’s Opening Brief at pp. 10-13.)

24 Respectfully submitted,

25 Dated: January 27, 2023

RUTAN & TUCKER, LLP  
MICHAEL RUBIN

26  
27 By:   
28 Michael Rubin  
Attorneys for Respondent, City of Anaheim

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF ORANGE**

3  
4 I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State  
5 of California. I am over the age of 18 and not a party to the within action. My business address is  
6 18575 Jamboree Road, 9th Floor, Irvine, CA 92612. My electronic notification address is  
7 mmartinez@rutan.com.

8 On January 27, 2023, I served on the interested parties in said action the within:

9 **CITY OF ANAHEIM’S REPLY ARBITRATION BRIEF (Limited to 5 Pages)**

10 as stated below:

11 Eric J. Benink  
12 BENINK & SLAVENS, LLP  
13 8885 Rio San Diego Dr., Ste. 207  
14 San Diego, CA 92108

15 E-Mail: eric@beninkslavens.com

16  (BY ELECTRONIC TRANSMISSION VIA JAMS ACCESS) by transmitting a true copy  
17 of the foregoing document(s) to the e-mail addresses set forth above.

18 Executed on January 27, 2023, at Irvine, California.

19 I declare under penalty of perjury under the laws of the State of California that the  
20 foregoing is true and correct.

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*/s/ Marisol Martinez*  
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